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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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In The Court Of Criminal Appeals
Austin, Texas

RECEIVED
COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS

Appellee

vs.

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COURT OF CRIMINAL APPEALS
12/15/2020
DEANA WILLIAMSON, CLERK

APRIL WILLIAMS,

Appellant

On Appeal From the Fourth Court of Appeals
San Antonio, Texas
Trial Court Cause No. 18-0874 –CR-B
Court of Appeals Cause No. 04-18-00883-CR

APPELLEE'S REPLY BRIEF

/s/Christopher M. Eaton
Christopher M. Eaton
Assistant County Attorney
Guadalupe County, Texas
State Bar No. 24048238
211 W. Court St., 3rd Floor
Seguin, Texas 78155
Phone: (830) 303-6130
Fax: (830) 379-9491
Attorney for Appellee

NAMES OF THE PARTIES

The State of Texas (Appellee-Petitioner):

Trial Counsel:

Steven Tays
Heather Hines-Wright
Guadalupe County Attorney's Office
211 W. Court St.
Seguin, Texas 78155

Appellant Counsel:

Christopher M. Eaton

Guadalupe County Attorney's Office
211 W. Court. St.
Seguin, Texas 78155

April Williams (Appellant-Respondent):

Trial Counsel:

Adrian Perez
310 S St. Mary's, Suite 875
San Antonio, Texas 78205

Appellant Counsel:

John Lamerson
P.O. Box 241
Corpus Christi, Texas 78403

Trial Judge:

Hon. Jessica Crawford
2nd 25th District Court
Guadalupe County, Texas

Fourth Court of Appeals Panel:

Sandee Bryan Marion, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument has already been denied.

APPELLEE'S REPLY TO APPELLANT'S ISSUE 2

Appellant was not entitled to a jury instruction on duress because she did not provide any evidence of an articulable and imminent threat of death or serious bodily injury. In addition, the trial court did not err in admitting evidence that the informant had previously purchased drugs from her because it was admissible under Rule 404(b)(2) to establish a prior relationship between them.

STATEMENT OF THE CASE

Appellant was charged with one count of manufacture or delivery of a controlled substance penalty group one in an amount equal to or greater than four grams but less than two hundred grams. (Clerk's Record ("CR"), pg. 3). A jury found her guilty and she was sentenced by the trial court to twenty (20) years confinement. Id. at pg. 53, 68.

Appellant appealed her conviction to the Fourth Court of Appeals. *Williams v. State*, 2020 Tex. App. Lexis 3982, pg. 1-9, 2020 WL 2543308 (Tex. App.—San Antonio 2020, pet. granted). The Court of Appeals reversed her conviction and ordered a new trial. *Id.* at 9. Appellee filed a petition for discretionary review to this Court. That petition was granted, and appellee filed its brief on October 21, 2020. Appellant filed her brief on November 24, 2020, which, in addition to responding to the issues raised in appellee's brief, presented arguments on two issues that were presented to the Fourth Court of Appeals, but not ruled on and not included in appellee's petition for review. Appellant files this reply to address those two additional issues.

STATEMENT OF THE FACTS

A Statement of Facts was included in its October 21st brief. Appellee has no additions or changes it wishes to make to that statement. Any additional facts needed to address to the two additional issues raised by appellant's response will be included in the Arguments and Authorities Section.

SUMMARY OF THE ARGUMENTS

For the reasons discussed in its October 21st brief, appellee believes the Fourth Court of Appeals erred when it reversed appellant's conviction on courtroom closure grounds. However, in addition to addressing that argument, appellant unexpectedly presented arguments on the two issues she presented to the Fourth Court of Appeals. The Fourth Court of Appeals did not rule on these issues because it had found that reversible error existed on the courtroom closure issue. Appellee's October 21st brief describes its position on the courtroom closure. The purpose of this Reply Brief is to address the additional issues raised by appellant's response.

With respect to the first of those issues, appellant was not entitled to a jury instruction on duress and the trial court did not err in disallowing her testimony regarding that issue. To be entitled to a duress instruction, she had to produce some evidence that she was compelled to sell drugs to the informant because of an imminent threat of death or serious bodily injury to herself or someone else. She was unable to do so.

In her brief, she argues that her boyfriend, Michael Vanburen, made such a threat. However, she provides no evidence that he was even aware of the transaction. She also cannot identify a concrete threat, cannot tie any of his actions to her commission of the

offense, and cannot overcome the fact he could not have executed any threat he made because he was incarcerated before, during, and after the commission offense. Even if she could overcome these problems, she was still not entitled to an instruction on the issue because she repeatedly placed herself in a position to be compelled to commit the offense by visiting Vanburen while he was incarcerated.

Additionally, the trial court did not err in admitting evidence of previous drug transactions between appellant and the informant because the evidence was admissible under Rule 404(b)(2). Specifically, it was admissible to prove the existence of a prior relationship between them, which is a valid exception to the rule. Alternatively, any error caused by the admission of that evidence was harmless because evidence of her guilt was overwhelming.

ARGUMENTS AND AUTHORITIES

<u>Appellee's Reply to Appellant's Issue 2</u>: Appellant was not entitled to a jury instruction on duress because she did not provide any evidence of an articulable and imminent threat of death or serious bodily injury. In addition, the trial court did not err in admitting evidence that the informant had previously purchased drugs from her because it was admissible under Rule 404(b)(2) to establish a prior relationship between them.

> *(a) Appellant was not entitled to a jury instruction on duress because she did not provide any evidence of an articulable and imminent threat of death or serious bodily injury.*

Duress is an affirmative defense and the defendant bears the burden of establishing evidence that supports the theory. *Carrillo v. State*, 2003 WL 22455305, pg. 2 (Tex. App.—El Paso 2003, no pet.). A defendant is entitled to a charge on any defensive theory raised by the evidence regardless of whether it is "strong, weak, unimpeachable or contradicted."

Swails v. State, 986 S.W.2d 41, 45 (Tex. App.—San Antonio 1999, pet. ref.'d). However, the claim must have an objective and reasonable basis. *Cameron v. State*, 925 S.W.2d 246, 250 (Tex. App.—El Paso 1995, no pet.).

To raise the defense of duress there must be some evidence that the defendant engaged in the offense because she was compelled to do so by a threat of imminent death or seriously bodily injury to herself or another. *Swails*, 986 S.W.2d at 46. A defendant is compelled to engaged in the conduct only if the force or threat of force would render a person of reasonable fitness incapable or resisting the pressure. *Id.* A threat is imminent only if it will occur in the present and not in the future. *Id.* In addition, the defense of duress is unavailable if a defendant intentionally, knowingly, or recklessly placed herself in a situation in which it was probable that she would be subjected to compulsion. *Murkledove v. State*, 437 S.W.3d 17, 20 (Tex. App.—Ft. Worth 2014, pet. dism'd untimely filed); *TEX. PEN CODE § 8.05(d).*

To meet the imminence requirement the defendant must show that (1) the person making the threat intends and is prepared to carry out the threat immediately and that (2) carrying out the threat is predicated on the person's failure to commit the charged offense immediately. *Anguish v. State*, 991 S.W.2d 883, 886 (Tex. App.—Houston[1st] 1999, pet. ref'd). When a trial court determines that the threat the defendant contends compelled her commission of the offense was not imminent, the trial court properly excludes evidence of that threat. *Id.*

The trial court properly excluded appellant's testimony regarding duress and any companion instruction in the jury charge because there was no evidence of an articulable

and imminent threat. At the rule 103 hearing, appellant attempted to argue that she committed the offense because her boyfriend, Michael Vanburen, made her do so. (RR Vol. 3, pg. 80-100). This first problem is that there is no specific, identifiable threat. Anthony Miller (in front of the jury), appellant (during the rule 103 hearing), and Yvonne Lopez (also during the 103 hearing) testified that Vanburen physically abused appellant. Id. at 63-73, 80-100, 100-105. However, none of them identified a specific threat or action related to her commission of the August 4, 2016 drug transaction. See Id. The only incident Miller gives a date for is an assault that occurred in 2007. Id. at 68. He does not attach dates to any of his other claims of physical abuse nor does he not connect them to the current offense. See Id. at 63-73.

The testimony given at the Rule 103 hearing suffers from similar issues. Lopez cannot remember any dates for any of the conduct she describes. Id. at 100-105. The closest she comes is when she suggests the "wreck charge" occurred in late 2016 or early 2017. Both of those dates would be after the offense had already occurred. Id. at 104. However, she is unsure of even this time frame. She also fails to offer any evidence that it (or any other incident she identifies) had anything to do with appellant's offense. See Id.

Appellant claimed that she was afraid of him and that she could not disobey him but does not provide any evidence that he knew of the August 4th transaction or that he had threatened to harm her if she did not complete it. Id. at 87. While she mentions a couple of specific incidents where he was abusive, neither supported the admission of duress evidence or an instruction based on it. During the 103 hearing, she stated that she was assaulted twice on or about July 17th, but never says that either one had anything August

4th transaction or even selling drugs in general. Id at 89-90. Moreover, it occurred more than two weeks before the informant even attempted to set up the transaction.

She also stated that Vanburen rammed her car on either September 4th or 5th (which resulted in his arrest it)[1] and that he loosened her car tires the following month (i.e., October). Id. at 81-82. She believed he rammed her vehicle because he feared her telling the "truth" in court. Id. at 84. However, she never says what "truth" she thinks he fears her telling and she never ties either act to her selling (or not selling) drugs to the informant on August 4th. See Id. Moreover, regardless of the reason for his actions in September and October, they cannot support a duress instruction because both incidents took place after she had committed the offense.

The only other threat she attributes to him is that he told her "[y]ou know what I'll do to you when I get out." Id. at 97. However, this is still insufficient. It is a threat of future action and not present action. *See Swails*, 986 S.W.2d at 45 (a threat is imminent "only if it will occur in the present and not in the future"). In addition, appellant does not provide any evidence that it had anything to do with the August 4th transaction. In fact, while she initially claims he made the threat on August 4th, she tells the prosecution she would need to look at a calendar when she is pressed on the issue. (RR Vol. 3, pg. 98). This made it clear she had no idea when he said this.

Furthermore, the statement was made during a jail call, which raises two significant problems. First, appellant was incarcerated before, during, and after the transaction took

[1] Based on the date given by appellant and her description of Vanburen's actions, this is likely what Lopez meant by the wreck charge. See Id. at 86, 101. If that is the case, then if further supports appellee's contention that it does not entitle appellant to a duress instruction because it occurred a month after the offense.

place. Id. at 97. She conceded that she was aware that he was arrested on July 24th, 2016. Id. at 92-93. The contact history admitted into evidence during the 103-hearing confirmed that he was booked into jail on July 24, 2016 and released on August 28, 2016. (State's Exhibit #10). It also showed that she visited him on July 30, August 1, August 6, August 8, August 15, and August 22. Id. Thus, not only was Vanburen in jail during the relevant time period, but appellant also knew he was in jail during that time frame.

The test for imminence requires a showing Vanburen was prepared to immediately carry out any threat he made and that he would carry out the threat if she did not sell drugs to the confidential informant immediately. *See Anguish*, 991 S.W.2d at 886. His incarceration meant could not carry out any threat he made. He cannot be immediately prepared to carry out a threat he lacks the ability to executed.

Second, the only reason she was that position at that time was because she chose to visit him while he was in jail. The Texas Penal Code explicitly states that a defendant cannot claim duress if they intentionally, knowingly, or recklessly put themselves in a situation where it is probable that they will be subjected to compulsion. *TEX. PEN CODE § 8.05(d).* By constantly making trips to the jail, she was putting herself in a position where she was likely to be threatened by Vanburen. Consequently, even if she could solve the timing, vagueness, and immediacy issues with her claim, the result would remain unchanged because the only reason she was in a position to be threatened at that time was because she kept putting herself in a position by visiting him at the jail.

The only other alternative she offers is her claim that a man named Charles was nearby making sure the business was taking place and to "look after" her. (RR Vol. 3, pg.

86, 88). This is also insufficient. She never specifies what she means by "making sure the business was taking place" or what he was doing to "look after her." See Id. There is no evidence he was aware of the transaction with the informant, that he was aware of anything Vanburen said while in jail (any other times), or that he would have done anything to her in Vanburen's place if she did not sell the drugs to the informant. There is also no evidence that Charles had made any threats or that he would or could presently (or in the future) carry out any threats Vanburen may have made. Thus, it does not support a duress instruction. Appellant did not provide any evidence that would have entitled her to a duress instruction, which means the trial court properly excluded her testimony regarding that issue and any companion jury instruction related to it.

> *(b) The trial court did not err in admitting evidence that the informant had previously purchased drugs from appellant because it was admissible under Rule 404(b)(2) to establish a prior relationship between them. Alternatively, because she was caught on tape committing the offense, any error caused by the admission of this evidence was harmless.*
>
> > *(b)(i) The trial court did not err in admitting evidence that the informant had previously purchased drugs from her because it was admissible to establish a prior relationship between them.*

Appellant courts review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State,* 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). This includes the admission or exclusion of extraneous conduct evidence. *Id.* A trial court does not abuse its discretion so long as its decision is within the zone of reasonable disagreement. *Rachal v. State*, 917 S.W.2d 799, 807 (Tex. Crim. App. 1996).

Rule 404(b)(1) of the Texas Rules of Evidence prohibits the admission of other crimes, wrongs, or bad acts to prove a person's character and to show that on a particular occasion the person acted in accordance with that character. *TEX. R. EVID. 404(b)(1).* However, such evidence is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *TEX. R. EVID. 404(b)(2).* This list is neither mutually exclusive nor exhaustive. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

The trial court properly admitted evidence that the informant had previously purchased drugs for appellant because it established a relationship between the parties. Appellant argues that using extraneous conduct to establish a relationship is not a permissible exception under Rule 404(b)(2). This claim should be rejected. This Court has explicitly permitted the use of extraneous conduct for that purpose. *Garcia v. State*, 201 S.W.3d 695, 702-705 (Tex. Crim. App. 2006); *Hernandez v. State*, 171 S.W.3d 347, 360-61 (Tex. Crim. App. 2005).

While both cases also involved Article 38.36 of the Texas Code of Criminal Procedure, that does not reduce their relevance to this case. That section only makes the nature of the relationship between the victim and defendant automatically relevant in murder cases. *TEX. CODE CRIM. PROC. § 38.36.* Nothing in *Hernandez* or *Garcia* purports to limit the admissibility of extraneous evidence for purpose of establishing relationship under 404(b)(2) to cases involving Article 38.36. *See Garcia*, 201 S.W.3d at 702-705; *See Hernandez*, 171 S.W.3d at 360-61. If anything, it is the opposite. This Court noted that for

extraneous conduct evidence to be admissible under 38.36 it also had to be admissible under rule 404. *Garcia,* 201 S.W.3d at 702-705;

This approach is consistent with the Court's general interpretation of Rule 404(b)(2). It has held that the list of exceptions listed in the rule is not exhaustive and has admitted evidence under that rule for reasons other than those listed in it. *See De La Paz*, 279 S.W.3d at 343. The most well-known example is permitting the use extraneous conduct evidence to rebut a defensive theory. *See Id.* Therefore, the most reasonable reading of this Court's interpretation of Rule 404(b)(2) is that extraneous conduct is admissible so long as it is relevant for a reason other than character conformity, including to establish a prior relationship.

The evidence of prior transactions between the informant and appellant was not admitted for the purpose of showing character conformity. Diaz testified that it was important that the people they recruit as informants can provide them with information on who they can buy from. (RR Vol. 2, pg. 183-84). It was possible that a potential informant did not have information and the officers did not want to plant that information themselves. (RR Vol. 2, pg. 183-84). The informant in this case claimed that he could buy drugs from appellant. Id. at 187. The fact that the informant had previously bought drugs from appellant supports Diaz's testimony that the informant possessed relevant information on her. It supports the conclusion that law enforcement did not plant the information and that he was a legitimate informant. The existence of a pre-existing buyer/seller relationship between the informant and appellant was relevant and was admissible under Rule 404(b).

(b)(ii) Alternatively, because she was caught on tape committing the offense, any error caused by the admission of the extraneous evidence was harmless.

The erroneous admission of extraneous evidence is a non-constitutional error subject harmless error analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Carter v. State* 145 S.W.3d 702, 710 (Tex. App—Dallas 2004, pet. ref'd). Rule 44.2(b) states that "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *TEX. R. APP. P. 44.2(B).*

A substantial right is effect when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.3d 266, 271 (Tex. Crim. App. 1999). "A criminal conviction should not be overturned for a non-constitutional error if the appellate court, after examining the record as a whole, has a fair assurance that the error did not influence the jury, or had but a slight effect. *Morales v. State*, 32 S.W.3d 826, 867 (Tex. Crim. App. 2000). Some of the factors Texas courts consider when trying to determine whether the admission of extraneous conduct constitutes harmless error include (1) whether the other evidence of the defendant's guilt is substantial or overwhelming, (2) whether or to what extent the state placed emphasis on the error, and (3) in the context of extraneous conduct evidence, whether other extraneous conduct evidence reflecting poorly on the accused's character was properly admitted or admitted without objection. *Horton v. State*, 986 S.W.3d 297, 304 (Tex. App.—Waco 1999, no pet.).

Any error caused by the admission of previous drug transactions between appellant and the informant was harmless. The State did not place a significant amount of emphasis on it. It was not mentioned during opening argument and was only briefly mentioned during

closing argument. Moreover, the only reference to in closing was a reference to how it established a prior relationship between them, i.e., the purpose for which the State sought to admit it. (RR Vol. 3, pg. 127). The State did not argue character conformity or say that it made her guilty of the charged offense.

Second, the evidence of appellant's guilt was overwhelming. Appellant was on video selling the crack cocaine to the informant. (State's Exhibit #1). She is seen on tape breaking the drugs into pieces, weighing them, and counting the money. Id. Even if the evidence of the prior transaction should not have been admitted, it had no impact on the verdict. Therefore, it did not have a "substantial and injurious effect in determining the jury's verdict" and was harmless *See King*, 953 S.W.3d at 271.

CONCLUSION AND PRAYER

WHEREFORE, appellee respectfully prays that this Honorable Court affirm appellant's conviction and sentence.

/s/Christopher M. Eaton
Christopher M. Eaton
Assistant County Attorney
Guadalupe County, Texas
State Bar No. 24048238
211 W. Court St., 3rd Floor
Seguin, Texas 78155
Phone: (830) 303-6130
Fax: (830) 379-9491
Attorney for Appellee

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/s/Christopher M. Eaton
Christopher M. Eaton

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Bar No. 24048238
chris.eaton@co.guadalupe.tx.us
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Associated Case Party: Guadalupe County Attorney's Office

Name	BarNumber	Email	TimestampSubmitted	Status
Christopher Eaton		Chris.Eaton@co.guadalupe.tx.us	12/14/2020 10:53:16 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
John MichaelLamerson		lamersonlawfirm@gmail.com	12/14/2020 10:53:16 AM	SENT